

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 12,144

FILED

APR 27 1954

WESTLEY W. SILVIAN, *Appellant,*

Joseph W. Stewart
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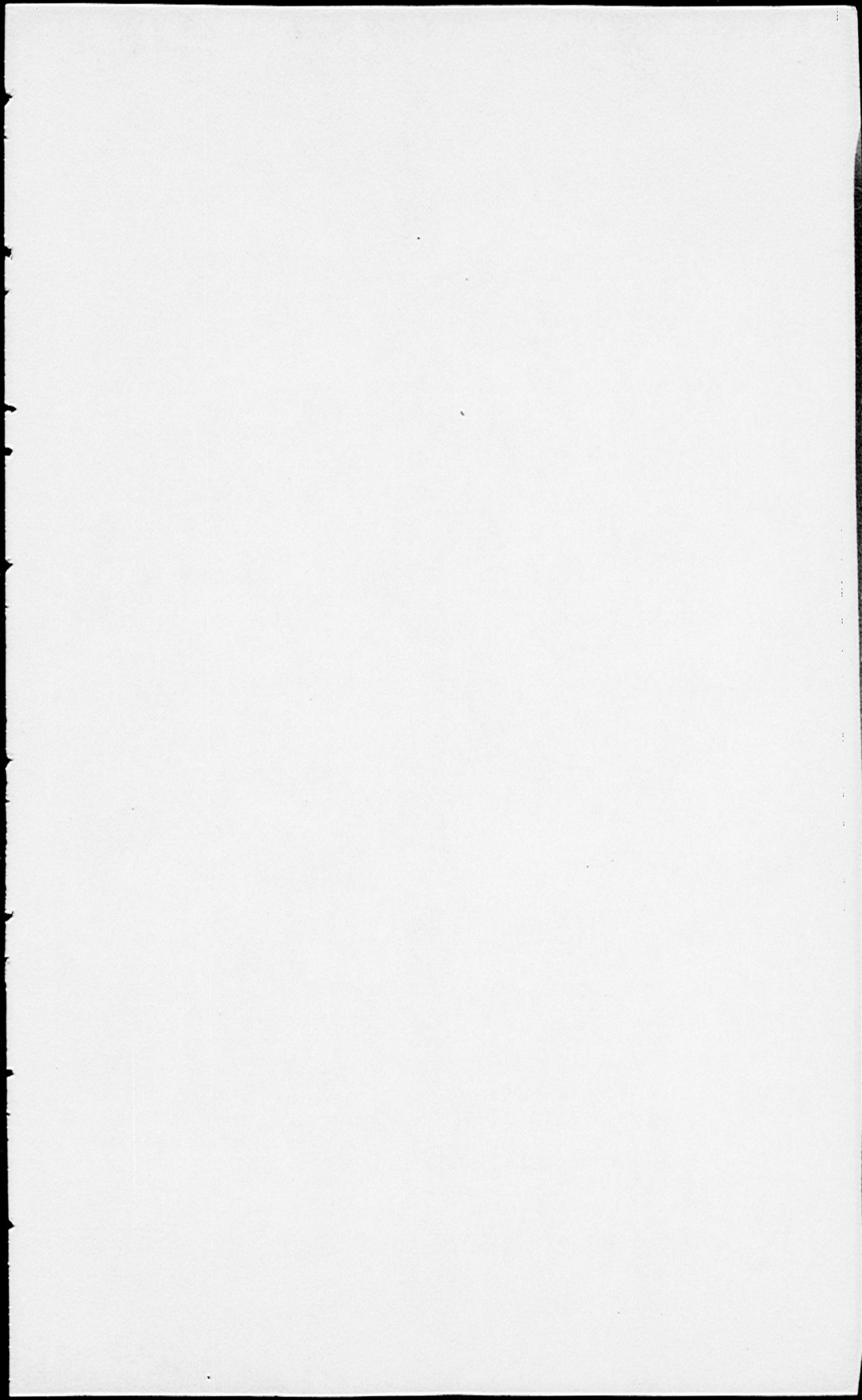
v.

HANNAH S. SILVIAN, *Appellee.*

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Appeal From The United States District Court
For The District of Columbia

ROBERT E. SHER
JAMES H. HELLER
1026 Woodward Building
Washington 5, D. C.
Attorneys for Appellant.



STATEMENT OF QUESTION PRESENTED

The sole question presented by this appeal is whether or not a husband who is required by court decree to pay \$200 per month for the separate maintenance of his wife and minor child in her custody, and who has previously transferred to her all of his cash and securities pursuant to a separation agreement executed contemporaneously with the decree, is entitled to temporary relief from the decree upon a showing that due to reasons beyond his control he has lost his position as government attorney (which was his sole source of income), and that he is earnestly seeking reinstatement or suitable alternative employment, whereas his wife not only still has the cash settlement which he paid to her, but is currently employed at a salary rate approximating \$3,000 per year.



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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,144

WESTLEY W. SILVIAN, *Appellant*,

v.

HANNAH S. SILVIAN, *Appellee*.

Appeal From The United States District Court
For The District of Columbia

JURISDICTIONAL STATEMENT

Plaintiff filed her complaint for maintenance and other relief in the District Court on March 10, 1953, (App. pp. 2-4), and defendant answered on March 11, 1953. (App. pp. 4, 5). The complaint and answer showed on their face that the District Court was vested with jurisdiction of the case pursuant to Sections 11-306 and 16-415 of the District of Columbia Code (1951).

The District Court entered a consent order for maintenance on March 12, 1953, (App. pp. 5, 6) and thereafter retained continuing jurisdiction of the case pursuant to Section 16-415, D.C. Code (1951); see also Section 16-413.

On October 7, 1953, defendant filed his Motion to Modify Order for Maintenance and Support (App. pp. 9-20). On November 23, 1954, the District Court entered an order denying defendant's motion (App. pp. 28, 29), and the instant appeal from that order was taken on December 21, 1953.

This Court has jurisdiction of the instant appeal by virtue of the Act of June 25, 1948, C. 646, 62 Stat. 929, 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellant and appellee (or defendant and plaintiff, as they will generally be called throughout this brief) were married on November 15, 1942, and subsequently, on August 11, 1944, a child was born to them. On June 6, 1952, as a result of irreconcilable mutual differences, they separated and have lived apart since that date, plaintiff having retained custody of the child. (App. pp. 2, 3, 14). During the period from June 6, 1952, to March 12, 1953, defendant provided in excess of \$300 per month for maintenance and support of plaintiff and the child. (App. p. 11).

On March 10, 1953, plaintiff filed in the court below a complaint for separate maintenance and other relief (App., pp. 2-4), and on March 11, 1953, defendant answered denying the major substantive allegations of the complaint, but admitting, as the complaint had specifically alleged, that his annual salary was in excess of \$9,000. (App. pp. 4, 5). On March 12, 1953, the District Court entered a consent decree requiring defendant to pay plaintiff \$200 per month for the maintenance of herself and her child. (App. pp. 5, 6).

At that time defendant possessed cash and securities assets of \$8,000, plus an automobile and his minor personal belongings. He was then employed, as he had been for many years, as an attorney in the Office of Alien Property, United States Department of Justice, at an annual salary of \$9,800, with a monthly take-home pay after tax and retirement deductions of \$523. (App. pp. 10, 11, 15).

On the day following the entry of the decree, viz. March 13, 1953, in full cognizance of these facts and on the as-

sumption that defendant would continue to hold his present position, or be otherwise employed at a comparable salary, the parties executed a separation agreement. By its terms, defendant paid over to plaintiff the lump sum of \$10,000 in cash, released to her all jewelry, furnishings and other personal property then in her possession, and agreed thereafter to maintain in full force life insurance of a face value of \$10,000 for the benefit of the child. (App. pp. 10-13, 15, 16). In order to make the cash settlement, defendant was forced to borrow \$2,000 to make up the difference between his own assets and the settlement figure. (App. pp. 12, 26). The agreement further recited the entry of the decree for maintenance on the preceding day and in substance incorporated its terms. (App. pp. 15, 16).

Thereafter, plaintiff and the child moved to Minnesota, and on May 1, 1953, defendant commenced making payments to plaintiff pursuant to the decree and continued to do so through July, 1953. During this period he continued to hold his position at the Office of Alien Property at the salary of \$9,800 per year. (App. pp. 11, 12).

However, on July 22, 1953, defendant was notified by a letter from the Deputy Attorney General that "effective at the close of business August 21, 1953, your services as an Attorney in the Office of Alien Property will be terminated." (App. p. 19). He later discovered that this action resulted from a major reduction in force of the Office of Alien Property. (App. p. 33).

Immediately after August 21, 1953, defendant protested his severance and undertook legal action to secure reinstatement. Less than ten days later, on September 1, 1953, the Civil Service Commission upheld defendant and ordered his reinstatement. Justice Department contested this ruling and filed an appeal therefrom which was still pending at the time of the entry of the order below of November 23, 1953. (App. pp. 12, 32, 33).

As plaintiff was aware, defendant had gone heavily into debt only the previous March in order to raise the \$10,000

cash settlement which he paid to her, and the termination of his employment left him without any income or other means to continue payments to her; as a consequence he fell into arrears. (App. pp. 10-13). Defendant concentrated his principal energies on trying to secure reinstatement. By these efforts he had obtained the initial Civil Service Commission ruling and he expected a final decision momentarily. For this reason he remained in the Washington area, where he found no immediate prospects of other employment. (App. pp. 12, 34, 35).

Notwithstanding defendant's situation, on September 29, 1953, plaintiff moved the court below to adjudicate defendant in contempt for failure to pay her maintenance after July.* (App. pp. 6, 7).

As a result, on October 7, 1953, defendant filed together his opposition to plaintiff's motion and his own motion for modification of the decree for maintenance. (App. pp. 8, 9). His affidavit and exhibit supporting these pleadings recited the foregoing facts and that as of that date, October 7th, his total cash assets were \$200. (App. pp. 8-23). Defendant further stated that he was informed that plaintiff was currently employed in her profession as a registered pharmacist at a salary of approximately \$500 per month, and in addition possessed the bulk of the \$10,000 in cash which she had received from him the previous March. (App. p. 12). Finally, defendant asserted his intention promptly to resume payments to plaintiff as soon as he was able to do so. (App. p. 13).

In her answering affidavit, plaintiff stated that her current income as a pharmacist was approximately \$250. She did not dispute the substantial facts concerning defendant's present situation, nor did she deny that she was able if necessary to rely upon the cash settlement which he had

* Her motion alleged that \$131.09 was due her from the month of May, although defendant had deducted this amount pursuant to Section 8 of the Separation Agreement to cover the cost of goods and services previously purchased by plaintiff on his credit, contrary to that provision. The offset of this amount could in no sense be considered a willful failure by defendant to keep up payments while he still held his job. (App. pp. 11, 22, 23).

made with her less than eight months before. (App. pp. 24-26). Defendant's reply affidavit, filed just prior to the hearing on the motions showed that as of November 3, 1953, he was reduced to cash assets of \$90.* (App. p. 26).

On November 20, 1953, both plaintiff's and defendant's motions were heard by the court below on the foregoing facts. After a brief hearing the court denied both motions. (App. pp. 28-37). Plaintiff has not appealed although she has subsequently filed a second motion to adjudicate defendant in contempt.

Defendant brings this appeal urging that on the basis of this record, the court below erred in denying his motion for temporary relief from the decree of March 12, 1953. He asks that this Court reverse the decision below for the reasons stated hereafter.

STATUTE INVOLVED

Title 16, Section 415, District of Columbia Code (1951):

"Whenever any husband shall fail or refuse to maintain his wife and minor children, if any, although able so to do, the court, on application of the wife, pendente lite and permanently, may decree that he shall pay her, periodically, such sums as would be allowed to her as pendente lite or permanent alimony in case of divorce for the maintenance of herself and the minor children, if any, committed to her care by the court, and the payment thereof may be enforced in the same manner as directed in regard to the payment of permanent alimony."

(Act of March 3, 1901, c. 854, 31 Stat. 1346, as amended June 20, 1949, c. 228, 63 Stat. 213.)

* Since the filing of this appeal, plaintiff has again moved the court below to adjudge defendant in contempt. His affidavit in opposition to this latest motion reveals that he has gone farther into debt to support himself and to keep up the life insurance payments of \$65 as required by the March agreement.

STATEMENT OF POINT ON APPEAL

The District Court erred in refusing to grant defendant's motion for temporary relief from the duty to provide maintenance to plaintiff.

SUMMARY OF ARGUMENT

A. The undisputed facts before the court below showed a complete change in the circumstances of the parties from those existing at the time of the original decree: defendant had previously divested himself of all of his assets and gone into debt in order to meet his obligations under the separation agreement. In August, 1953, for reasons beyond his control, defendant lost his position of employment, which was his only source of income. While he was earnestly seeking reinstatement with every hope of success, plaintiff was currently employed at a substantial income in addition to the large cash assets in her possession as a result of defendant's previous payment of \$10,000 to her. In these circumstances, defendant was entitled to a remission of maintenance payments for the period that he was without income or capital assets.

B. The court below should have granted defendant's motion for the same reasons that it properly denied plaintiff's motion to adjudicate defendant in contempt. Both motions were heard simultaneously on the same facts, and both were subject to the same equitable considerations.

ARGUMENT

A. The Undisputed Facts of Record Showed a Change in the Circumstances of The Parties Entitling Defendant to Temporary Relief For The Duration of His Current Financial Situation.

The legal principles governing this case are so deeply rooted in this jurisdiction that they do not require extensive discussion. What defendant sought by his motion was *temporary* relief from the duty to provide maintenance in view of his changed financial situation and other new cir-

cumstances. The District Court had the undoubted power to grant such relief. In passing on the motion it was required to exercise "a judicial discretion and not an arbitrary discretion." *Tolman v. Tolman*, 1 App. D.C. 299, 311 (See also *Quarles v. Quarles*, 86 App. D.C. 41, 179 F. 2d 57). Previous decisions of this court have set out rules by which such motions must be decided.

Maintenance payments are by statute, as well as by decision, based upon defendant's financial ability. Section 16-415 of the District of Columbia Code (1951) provides that maintenance shall be decreed *only*,

"Whenever any husband shall fail or refuse to maintain his wife and minor children, if any, *although able so to do . . .*" (Emphasis supplied.)

This Court has repeatedly held that where a subsequent change in a husband's financial situation renders him unable to continue alimony or maintenance payments required by a prior decree, he may petition for and receive a reduction or suspension of his obligation. In the early case of *Alexander v. Alexander*, 13 App. D.C. 334, where the trial court had previously modified the original alimony decree on four separate occasions, the wife petitioned to vacate the last modification and restore the initial decree. In affirming the denial of her petition, this court stated at some length the considerations underlying the rule permitting modification:

"The decree of alimony is based upon the conditions existing at the time at which it is rendered; but these conditions are subject to change. The faculties of the husband at and before the time of the adjudication to discharge his legal and moral duties may have been ample. Through circumstances beyond his control, and by no fault of his, they may have afterwards become greatly impaired. Assuredly it would not be just, even towards a greatly injured wife, who has been compelled to seek the protection of the law against his misconduct, to hold him to the same rigid liability in the days of his poverty as in the days of his prosperity . . ." 13 App. D.C., 334, 348, 349.

In *Kephart v. Kephart*, 90 App. D.C. 348, 193, F. 2d 677, cert. denied, 342 U.S. 944, it was said that modification or rescission could be granted where defendant's other obligations had increased, even though his finances had not declined. Recently, in a brief decision in *Richardson v. Richardson*, — App. D.C. —, 207 F. 2d 134, the court stated that modification was proper even though defendant might presently be in contempt for arrears.

The amount of maintenance is not dependent on the husband's condition alone. The wife's needs and the extent of her economic independence are also major factors in determining the husband's initial obligation and therefore his right to have it modified. Otherwise, as the court noted in *Alexander v. Alexander*, 13 App. D.C. 334, supra, the husband might be reduced to poverty but nonetheless still be under legal duty to contribute to a wife who was economically self-sufficient. In *Dausuel v. Dausuel*, 90 App. D.C. 275, 195 F. 2d 774, it was said that the wife's earnings were relevant to the amount of alimony, and in *O'Neil v. O'Neil*, 57 App. D.C., 18 F. 2d 805, the court set alimony in relation to the respective incomes of both parties. In other jurisdictions it has generally been held that the wife's employment subsequent to the entry of the original decree is an important, if not decisive, consideration militating in favor of reducing maintenance payments. See cases collected in Note, 18 A.L.R. 2d 10, at pp. 59 et seq.

Appellant does not urge that appellee's current income and cash assets alone warrant the granting of his motion, although that question was argued but expressly left open by this Court in *Reed v. Reed*, 52 App. D.C. 35, 280 Fed. 1009, but that they are important aspects of the changed circumstances which have come about since the date of the original decree.

These basic legal principles bear directly upon the decisive facts of this case. On March 12, 1953, when the decree for maintenance was entered, defendant was earning \$9,800 per year, (or over \$800 per month), and had assets in cash and securities approximating \$8,000. On November

23, 1953, the date of the order appealed from, he was unemployed, without any source of current income, and his cash assets totalled only \$90. Only the previous March he had had to borrow \$2,000 in order to make up the \$10,000 he had paid plaintiff the cash settlement provided for in the agreement. Meanwhile, plaintiff had secured employment at a salary approximating \$3,000 per year, (or \$50 more per month than she received under the decree), and less than eight months before she had received from defendant \$10,000 in cash settlement which she was able to fall back upon in the event that she found her salary insufficient to meet her current standard of living. In view of defendant's changed financial condition she was not entitled to maintenance in accordance with her 'station in life'; as his wife, she also shared his financial fortunes, for better or for worse, insofar as she was still dependent upon him. *Russell v. Russell*, 79 App. D.C. 44, 142 F.2d 753, 153 A.L.R. 1037.

Defendant's motion did not rest on these facts alone, however. After termination of his services as attorney for the Office of Alien Property, defendant had no immediate prospect of other employment. He therefore devoted his principal efforts to securing reinstatement, a course which held out the most favorable and immediate prospect that he would be able to resume full payments to plaintiff. He had made those payments regularly while he was employed, and in his affidavit he unequivocally stated his intention to resume them as soon as he was able. Meanwhile, despite his financial situation, he continued to pay the current premiums on the life insurance which he had agreed to maintain. However, on September 29, 1953, plaintiff moved the court to adjudge defendant in contempt, notwithstanding his obvious inability at that time to comply with the March decree. In these circumstances defendant filed his motion for temporary remission of maintenance.

We submit that on these facts it was error to deny the motion in the light of the equitable principles which have been announced by this court. Indeed, if the court below

did not err and therefore the defendant was not entitled to relief, it is hard to imagine a case short of major physical disability which would warrant such relief. Certainly a court of equity will not require that a man be in such utter despair and ruin before he may have his burden lightened.

B. The Court Below Should Have Granted Defendant's Motion For The Same Reasons That It Properly Denied Plaintiff's Motion to Adjudicate Defendant in Contempt.

Appellant believes it is also evident from another view that the District Court erred in denying his motion for relief. That motion was heard simultaneously with plaintiff's first motion to adjudicate defendant in contempt, (another has since been filed), and both motions came before the court below on precisely the same facts. The court properly denied plaintiff's motion to adjudicate defendant in contempt but refused to grant defendant's motion for relief from the duty to make payments to plaintiff.

In the early case of *Tolman v. Leonard*, 6 App. D.C. 224, this Court stated the conditions under which enforcement of an alimony decree by contempt would not lie:

“If an answer should show clearly the inability of a party to comply with the order, and there is nothing to the contrary, he ought to be discharged.” 6 App. D.C. 224, 235.

See also *Kephart v. Kephart*, 89 App. D.C. 373, 193 F. 2d 677, cert. denied, 342 U.S. 944, *supra*; and *Caffrey v. Caffrey*, 55 App. D.C. 285, 4 F. 2d, 952.

As we have shown in the preceding section, defendant showed his current inability to comply with the original decree of maintenance, and plaintiff offered “nothing to the contrary”. For the very same reasons, however, he also sought positive *relief* from the March decree and this was denied him. We submit that this was error; the District Court, having properly refused to hold defendant in contempt, as an equitable corollary should have granted his motion to modify. Since he was unable to comply with

the terms of the original decree, defendant was entitled to relief from this burden. As counsel stated during the hearing before the court below, "... these motions are being heard together because they are two sides of the same coin ~~case~~." (App. p. 32).

We believe the situation is squarely covered by the opinion in *Alexander v. Alexander*, 13 App. D.C. 334, supra, where this Court approvingly stated appellant's position on this question:

"It is conceded on the part of appellant that upon good cause shown of inability on the part of the husband to pay the alimony, the court might order a suspension of payment and would not, or should not, punish him as for contempt of court." 13 App. D.C. 334, 350.

This is precisely what was done in *Eliasson v. Eliasson*, 68 App. D.C. 391, 98 F. 2d 263, cited in Note, 18 A.L.R. 2d, 10, 30. It is what should have been done here. The District Court recognized that defendant should not be held in contempt in view of the existing circumstances. For the same reasons it should have granted defendant the positive relief which he sought for the duration of those circumstances.

CONCLUSION

For the reasons set forth above, appellant submits that the District Court erred in denying his motion for temporary relief from the obligation to pay maintenance to plaintiff. The decision of the court below should be reversed with directions to enter an order granting defendant's motion.

Respectfully submitted,

ROBERT E. SHER

JAMES H. HELLER

1026 Woodward Building

Washington 5, D. C.

Attorneys for Appellant.

APPENDIX

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,144

WESTLEY W. SILVIAN, *Appellant*,

v.

HANNAH S. SILVIAN, *Appellee*.

Appeal From the United States District Court for the
District of Columbia

JOINT APPENDIX

14 IN THE UNITED STATES DISTRICT COURT FOR THE
 DISTRICT OF COLUMBIA

C. A. No. 1075—'53

HANNAH S. SILVIAN,
500 Domer Avenue,
Apt. #201,
Takoma Park, Maryland, *Plaintiff*

vs.

WESTLEY W. SILVIAN,
c/o Department of Justice,
Office of Alien Property Custodian,
Third and Constitution Ave., N. W.,
Washington, D. C., *Defendant*

Filed March 10, 1953

Complaint for Maintenance and for Other Relief

This Court has jurisdiction of the subject matter here involved, pursuant to Title 16-415, D. C. Code, 1940 Edition.

(1). The plaintiff Hannah S. Silvian, is a citizen of the United States and a resident of Montgomery County, State of Maryland, and brings this action in her own right as plaintiff and wife of the defendant.

(2). The defendant Westley W. Silvian is a citizen of the United States and until September of 1952, a resident of Montgomery County, State of Maryland; and upon information and belief, is now a resident of the District of Columbia; and is sued in his own right as defendant and husband of the plaintiff.

(3). The parties hereto were married in the District of Columbia on November 15, 1942; one child was born to parties as a result of this union, a daughter, Jo Jacoba

Silvian, on August 11, 1944. The said infant daughter is in the custody of the plaintiff.

(4). Since the marriage of the parties hereto, the plaintiff has been a loyal, faithful and dutiful wife and mother and has never given the defendant any reason or justification for his actions in the Summer of 1952, culminating in his deserting and abandoning his wife and child on or about September 1, 1952.

15 (5). Since the said desertion and abandonment of the plaintiff, defendant has failed and refused to adequately maintain and provide for his said wife and minor child.

(6). The defendant is employed by the United States Government as an attorney in the Department of Justice and upon information and belief, plaintiff alleges that his salary is in excess of Nine Thousand Dollars (\$9,000.00) per year.

WHEREFORE, the premises considered, your Complainant prays:

(1). That the return of process of this Court be directed against the defendant herein, requiring him to answer the exigencies hereof.

(2). That this Honorable Court sign an order directing the defendant to pay a reasonable amount to the plaintiff pendente lite for the support and maintenance of herself and minor child, taking into account her station in life and his ability to provide for them.

(3). That upon a final hearing, this Honorable Court decree that the defendant be required to pay the plaintiff a reasonable sum as permanent maintenance for the support and maintenance of the plaintiff and their minor child, taking into account her station in life and his ability to provide for them.

(4). That the Court order the defendant to pay a reasonable sum as attorney's fee and suit money for the plaintiff's attorney of record.

(5). And for such other and further relief as to the Court may seem just and proper.

HANNAH S. SILVIAN
Hannah S. Silvian

SAMUEL B. BLOCK
Samuel B. Block,
Attorney for plaintiff,
1511 K St., N. W.
Di. 7-6296

16 DISTRICT OF COLUMBIA, ss:

HANNAH S. SILVIAN, being first duly sworn according to law, deposes and says: That she has read the foregoing complaint by her subscribed and knows the contents thereof; that the matters and things therein set forth as of her own personal knowledge are true, and that those stated upon information and belief, she believes to be true.

HANNAH S. SILVIAN
Hannah S. Silvian

Subscribed and sworn to before me this 10th day of March, 1953.

LILLIAN V. CRAWFORD
Notary Public, D. C.

17 Filed March 11, 1953

* * * * *

Answer

Comes now the defendant, by his attorney, and for answer to the Complaint filed herein says:

(1) Admits the allegations of Paragraph 1, 2, 3 and 6 of the Complaint.

(2) Denies the allegations set forth in Paragraphs 4 and 5 of the Complaint.

WHEREFORE, defendant demands judgment dismissing the Complaint, together with his costs.

WESLEY W. SILVIAN
Westley W. Silvian

ROBERT E. SHER
Robert E. Sher
Attorney for Defendant
1026 Woodward Building
Washington, D. C.

District of Columbia, ss:

WESTLEY W. SILVIAN, being first duly sworn, on oath deposes and says that he has read the foregoing Answer and knows the contents thereof; that the matters and things set forth therein are true of his own personal knowledge.

WESTLEY W. SILVIAN

Subscribed and sworn to before me this 11th day of March, 1953.

MILDRED M. BOYD
Notary Public, D. C.

My commission expires June 30, 1956

* * * * *

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Filed March 12, 1953

Final Order for Maintenance

Upon consideration of the complaint and motion for maintenance pendente lite filed by the plaintiff, and the answer filed by the defendant, and the consent of the parties hereto, it is by the Court this 12th day of March, 1953;

ORDERED, That the defendant Westley W. Silvian, pay to the plaintiff Hannah S. Silvian, as maintenance for her support, the sum of One Hundred Dollars (\$100.00) per month, on the first day of each month hereafter, commencing on May 1, 1953, and it is further;

ORDERED, That the defendant Westley W. Silvian pay to the plaintiff Hannah S. Silvian as maintenance for the suport of the minor child, Jo Jacoba Silvian, the sum of One Hundred Dollars (\$100.00) per month on the first day of each month hereafter, commencing on May 1, 1953.

BY THE COURT:

F. DICKINSON LETTS

Judge

Consented to:

HANNAH S. SILVIAN

Plaintiff

WESTLEY W. SILVIAN

Defendant

SEEN:

SAMUEL B. BLOCK

Attorney for Plaintiff

ROBERT E. SHER

Attorney for Defendant

20

Filed September 29, 1953

* * * * *

Motion to Adjudicate Defendant in Contempt

Comes now the plaintiff, Hannah S. Silvian, by and through her attorney, and moves the Court (1) to adjudicate the defendant, Westley W. Silvian, in contempt of Court for his failure to pay to the plaintiff the amounts of maintenance due in accordance with the order of court dated March 12, 1953, in the amount of \$531.09, and (2) for a money judgment for the amount of arrears and files her affidavit in support hereof which is attached hereto.

SAMUEL B. BLOCK

Samuel B. Block

1511 K Street, N. W.,

Attorney for plaintiff

Points and Authorities

1. Order of this Court dated March 12, 1953.
2. Affidavit of the plaintiff attached hereto.
3. Title 16, Section 415 of the District of Columbia Code.

SAMUEL B. BLOCK
 Samuel B. Block
Attorney for plaintiff

21 Filed September 29, 1953

* * * * *

**Affidavit in Support of Motion to Adjudicate Defendant
 in Contempt**

HANNAH S. SILVIAN, being sworn upon oath deposes and says:

That she is the plaintiff in the above entitled cause, that the final judgment entered herein on the 12th day of March, 1953, among other things, provided that the defendant pay to the plaintiff, for the support of herself and minor child the sum of \$200.00 per month, the first payment to be made on May 1st, 1953; that under said order there was due and payable to the plaintiff from the defendant, up to and including September 1st, 1953, the sum of \$1000.00, of which sum the defendant has paid \$468.91; and at the present time the defendant is in arrears in the total sum of \$531.09 under said order, which amount the defendant has refused to pay.

HANNAH S. SILVIAN

Suscribed and sworn to before me this 24 day of September, 1953.

HENRY LEVINE,
Notary Public

Henry Levine, Notary Public, Hennepin County, Minn.
 My Commission Expires Dec. 17, 1958

Filed October 7, 1953

Motion to Modify Order for Maintenance and Support

Defendant moves the Court for an order temporarily relieving defendant from the prior Order of this Court, entered herein on March 12, 1953, requiring defendant to provide maintenance and support for Hannah S. Silvian, plaintiff, and Jo Jacoba Silvian, minor child of plaintiff and defendant. As grounds for the motion defendant states as follows:

1. The aforesaid Order of March 12, 1953 put defendant under the duty of providing Two Hundred Dollars (\$200.) per month maintenance and support. This provision was included in an Agreement between plaintiff and defendant entered into on March 13, 1953. (Defendant's Exhibit No. 1 attached hereto.) At the time of the Order and Agreement, defendant was employed by the United States Department of Justice as an attorney at an annual salary of Nine Thousand Eight Hundred Dollars (\$9,800.). This employment and salary were defendant's only source of income; he has no real property, nor any personal property other than personal belongings of minor value. The provisions of the Order and Agreement were premised on defendant's continued tenure and employment at a substantially similar or greater income. (Affidavit of Westley W. Silvian, attached hereto.)

24 2. On August 21, 1953, defendant was severed from his position as attorney in the Department of Justice (Defendant's Exhibit No. 2 attached hereto). Despite his earnest efforts to secure reinstatement or new employment, he has been without any employment or income since that date, and has no immediate prospects of employment. At the present time, defendant has no means of self-support nor any property other than personal belongings of minor value, and he is unable to pay any part of the maintenance and support required by the aforesaid Order and Agreement. (Affidavit of Westley W. Silvian, attached hereto.)

3. Plaintiff herein, defendant's wife and the mother and guardian of the minor child, Jo Jacoba Silvian, is a registered pharmacist, and defendant is reliably informed that plaintiff is presently employed in that capacity and is earning in excess of Five Hundred Dollars (\$500.) per month. (Affidavit of Westley W. Silvian, attached hereto.)

In view of these circumstances, defendant moves the Court for an order relieving him of the duty of paying maintenance and support of Hannah S. Silvian and Jo Jacoba Silvian until such time as he shall secure new employment or reinstatement in his former position.

ROBERT E. SHER

JAMES H. HELLER

Attorneys for Defendant

1026 Woodward Building

Washington 5, D. C.

26 **Memorandum of Points and Authorities in Support of
Defendant's Motion to Modify Order for Maintenance
and Support**

This motion is made pursuant to Title 16, Section 415, D.C. Code (1951); U. S. Dist. Ct. D.C. Rules 9, 9(h); and F.R.C.P. Rule 7(b).

1. It is clear that this Court retains jurisdiction in cases in which a decree of permanent alimony or a final order of maintenance and support has been entered, and that the Court may at any time prospectively modify or suspend such a decree or order.

Thompson v. Thompson (D.C.) 226 U.S. 551; See also *Kephart v. Kephart*, 89 App. D.C. 373, 193 F. 2d 677.

2. As his affidavit shows, defendant has been severed from the position of employment which he held at the time that the decree herein was entered and the agreement referred to in the affidavit was executed. As a result, defendant is without any present means of income or prospects

of employment, and has no property with which to pay the monthly maintenance sums required by the decree of this Court and the aforementioned agreement. Moreover, defendant is reliably informed that plaintiff is presently employed and is earning in excess of \$500 per month.

In view of these unanticipated changes in circumstances, defendant submits that he should be relieved of the present duty of providing maintenance for plaintiff and
 27 for the minor child in her custody until such time as he secures such new employment as will enable him to perform this duty, and moreover that he should be relieved of the future burden of making up arrears which accrued at a time when he was wholly unable to pay them.

Respectfully submitted,

ROBERT E. SHER

JAMES H. HELLER

Attorneys for Defendant

1026 Woodward Building
 Washington 5, D. C.

* * * * *

28

Affidavit

District of Columbia, ss:

Westley W. Silvian, being first duly sworn, on oath deposes and says:

In above entitled action in which I was the defendant, an Order for Maintenance was entered by this Court by consent of the parties on March 12, 1953, directing me to pay to my wife, Hannah S. Silvian, the sum of \$100.00 per month for her support and an additional \$100.00 per month for the support of our minor child, said payments to commence on May 1, 1953. On March 13, 1953, my wife and I entered into a separation agreement, a copy of which is attached hereto, which incorporated the support and maintenance provisions of the Order of this Court of March 12 referred to above.

At that time I was employed as an attorney in the Office of Alien Property of the Department of Justice at a salary of \$9,800 per year. After deductions for taxes and retirement, my monthly salary checks totaled approximately \$523.00 per month.

29 Under the terms of the separation agreement I paid my wife the sum of \$10,000. We had been living apart for several months prior to the date of the order and agreement, during which time I contributed to the support of my wife and child at an amount in excess of \$300.00 per month. Under the terms of the separation agreement it was agreed that the monthly payments for support and maintenance provided therein were not to commence until May 1, 1953.

Paragraph 8 of such agreement provides as follows:

The wife hereby warrants and represents to the husband that she will indemnify and save the husband harmless from any and all marital obligations and liabilities for necessities incurred prior to the date of this agreement.

Pursuant to this provision, I deducted from the first monthly payment the sum of \$131.09, representing the following obligations incurred by my wife, which I paid:

Dr. Elmer Klein	\$75.00
Dr. David B. Veax	34.00
Dr. Naomi M. Kanoff	15.00
Frank R. Jelleff, Inc.	7.09
Total	\$131.09

On May 5, 1953, my wife's attorney protested this deduction and threatened to bring legal action. The June and July monthly payments were thereafter made by me and no further protest was made to me by my wife's attorney with respect to the May payment.

The provisions for support and maintenance in both the order and agreement were based upon the assumption that my employment with the Department of Justice would continue or that I would be otherwise gainfully employed. On July 22, 1953, I received a letter from the Deputy Attorney General dated July 20, 1953, advising me of the termination of my services as an attorney in the Office of Alien Property, effective at the close of business on August 21, 1953. A copy of such letter is attached hereto. My services were terminated on August 21, 1953, pursuant to such letter. I immediately protested the termination and requested reinstatement. On September 1, 1953, the Civil Service Commission directed the Department of Justice to restore me to duty. The Department of Justice has filed an appeal with the Commission against such ruling and the matter is still pending. In the interim I am unemployed and have no immediate prospects of other employment.

Pursuant to the terms of the separation agreement, I paid my wife the sum of \$10,000 in cash. In order to make this payment I disposed of all property in my possession or control and, in addition, borrowed the sum of \$2,000. Aside from the sum of approximately \$200 in cash, which I need for my own support, I have no other property of any kind or character and no means with which to make the monthly payments provided for in the order and agreement referred to above.

I did not make the August payment because at that time I had already received the notice from the Department of Justice of the termination of my services there and I had to have funds with which to maintain myself until I could either be reinstated or find comparable employment.

31 I knew that my wife and child were not in need or want because of the payment of the \$10,000 as aforesaid and because I am informed and believe that my wife is presently employed in her profession as a registered pharmacist at a salary in excess of \$500 per month.

The September payment was not made because I was then unemployed and had no source of income. On September 16, 1953, I was served with a complaint in an action brought by my wife for divorce in the State of Minnesota, in which my wife seeks to incorporate in the decree the maintenance and support provisions of the aforesaid order of March 12, 1953, and the agreement of March 13, 1953. The present motion was served on me on September 28, 1953.

In the event that I am reinstated in my government position or am able to obtain comparable employment elsewhere, I shall promptly resume the monthly payments provided for in the order and agreement. At the present time I am unable to do so.

WESTLEY W. SILVIAN

Subscribed and sworn to before me this 6th day of October, 1953.

MILDRED M. BOYD

Notary Public, D. C.

Commission expires: 6-30-56

Defendant's Exhibit No. 1

Agreement

MADE, this 13th day of March, 1953, by and between WESTLEY W. SILVIAN, hereinafter referred to as the "Husband", and HANNAH S. SILVIAN, hereinafter referred to as the "Wife";

WITNESSETH: That,

WHEREAS, the parties hereto were lawfully married November 15, 1942 in the District of Columbia; and,

WHEREAS, one child was born to the parties hereto as a result of the marriage, said child being named Jo Jacoba Silvian, born on August 11, 1944; and,

WHEREAS, due to unfortunate and irreconcilable differences between them, the parties have not lived together since June 6, 1952. The wife has charged the Husband with misconduct and with abandonment and desertion without cause, all of which charges the Husband denies. The wife has filed a suit in the District Court of the United States for the District of Columbia against the Husband for separate maintenance and has also informed the Husband that she intends to file a suit for alienation of affections against the alleged third party. The parties desire by this Agreement to finally and conclusively settle all matters of dower, curtesy, property rights, support and maintenance, custody of the child, and all other rights or claims of any nature, legal or equitable, arising out of or in any way connected with the marriage relationship.

Now, THEREFORE, in consideration of the premises, it is mutually agreed as follows:

(1) It shall be lawful for the parties to continue
33 to live separate and apart from each other, and so long as they continue to do so, each shall be free from interference, authority and control, directly or indirectly, by the other, as fully as if he or she was sole and unmarried. Each may reside at such place or places as he or she may elect. Each may, for his or her separate use and benefit, conduct, carry on or engage in any business,

trade, profession or employment which to him or her may seem advisable.

(2) The parties shall not molest, annoy or interfere with each other, nor shall either of them compel or attempt to compel the other to cohabit or dwell with him or her by any means whatever.

(3) All wearing apparel and personal jewelry and ornaments of the Wife; all personal property belonging to the Wife now in her possession; all furniture, furnishings, china, linen, silverware, bric-a-brac, etc. now in the apartment at 500 Domer Avenue, Takoma Park, Maryland, and in the Wife's present possession, shall belong fully and absolutely to the Wife, and the Husband does hereby relinquish all right, title and interest that he might have therein.

(4) The Wife shall have custody and control of the daughter, Jo Jacoba Silvian, subject to the right of the Husband to visit the child at all reasonable times and upon reasonable notice.

(5) The property in the possession or control of the Husband, exclusive of insurance policies, consists of cash and securities of the approximate value of Eight Thousand

34 Dollars, (\$8,000.00) and one automobile having a value of approximately Twelve Hundred Dollars (\$1200.00). The cash and securities referred to herein were derived in part from the sale of 250 shares of Purity Baking Company stock received by the parties from the Wife's mother in September of 1949, and later sold and the proceeds used for the purchase of other securities and for other purposes. In addition to the above, the household goods and the furnishings of the parties now located in the Wife's apartment at 500 Domer Avenue, Takoma Park, Maryland, were purchased and paid for by the Husband at a cost of approximately Five Thousand Dollars (\$5,000.00).

(6) Upon the execution of this Agreement, the Husband shall pay over to the Wife the sum of Ten Thousand Dollars (\$10,000.00) in cash. Whereas, an order has been

entered by the United States District Court for the District of Columbia in Case No. 1075-53 directing the Husband to pay certain stipulated monthly sums for the support of the Wife and child; the Husband hereby agrees to make the following payments for support and maintenance:

(a) Commencing on May 1, 1953, the Husband, during his lifetime, shall pay to the Wife the sum of Two Hundred Dollars (\$200.00) per month for the support and maintenance of herself and the said Jo Jacoba Silvian, until such time as the said Jo Jacoba Silvian shall become self-supporting, married or have reached the age of Twenty-One (21) years, at which time, the monthly payment of Two Hundred Dollars (\$200.00) shall be reduced to One Hundred Dollars (\$100.00) per month.

35 (b) In the event the Wife remarries, the obligation of the Husband to pay for her individual support and maintenance shall thereupon cease; however, the Husband shall continue payments of One Hundred Dollars (\$100.00) per month for the support and maintenance of their minor child Jo Jacoba Silvian, as hereinbefore provided in Paragraph 6 (a) of this Agreement.

(7) The Husband agrees to maintain and keep in force upon the life of himself, or the wife, or the child, life insurance policies of a total face amount of not less than Ten Thousand Dollars (\$10,000.00), with the child Jo Jacoba Silvian as insured or beneficiary.

The Husband shall keep in force and continue to pay the premiums on said policies until the said child reaches the age of Twenty-One (21) years. In the event the Husband shall remarry and should any children be born of such marriage, then in that event, Jo Jacoba Silvian shall be named as a beneficiary with any such other children, equally, share and share alike.

The Husband shall have the right to borrow upon the cash surrender of above policies; and the amount payable to the child at the maturity of any of such policies shall be

the net amount remaining after payment of any loan outstanding against such policy.

36 (8) The Wife hereby warrants and represents to the Husband that she will indemnify and save the Husband harmless from any and all marital obligations and liabilities for necessities incurred prior to the date of this Agreement, and that from the date of the execution of this Agreement, she will not incur any debt, obligation or liability in the name of the Husband for necessities or otherwise; and that she will make any and all obligations and contracts for her own use in her individual name and upon her individual responsibility.

(9) Each of the parties releases and forever discharges the other, as well as all third persons, from any and all claims, obligations or liabilities, arising out of or in any way connected with, the marriage relationship of the parties, including any and all claims that any person not party to this Agreement interfered with, or was in any way responsible for, the breaking up of the marriage relationship. Each of the parties hereto bars himself and herself of, and releases and discharges the other from any and all rights and claims by way of support, maintenance (except as provided in Paragraph 6 of this Agreement), alimony, dower, curtesy, and any other rights of any kind, arising out of the marital relationship in any property, real, personal or mixed, that each may have or may hereafter acquire. Neither of the parties shall institute any legal proceedings against the other or against any person not party to this Agreement based upon the charge that either of the parties hereto has been engaged in any misconduct with any third person or persons during the marital relationship.

10. Each party hereto waives and relinquishes any and all rights to participate in the estate of the other in
37 the event of the other's death, either by way of inheritance, or by statutory right as surviving spouse, or otherwise, and each waives, abandons and relinquishes all rights to act as administrator of the other's estate.

(11) Each of the parties hereto agrees to execute and deliver to the other party any and all deeds, releases, instruments, or other papers necessary to carry out the provisions of this Agreement.

(12) This agreement is not intended, and is not to be construed to prevent either party from suing for a divorce in any proper jurisdiction. No decree so obtained by either party shall in any way affect this Agreement or any of the terms, covenants or conditions hereof.

(13) The parties hereto expressly declare that each has had independent legal advice by counsel of his and her own respective selection and has been fully advised of all legal rights and liabilities in the premises; that, after obtaining such advice, each has voluntarily entered into this Agreement with full knowledge of its legal effect, believing the same to be fair, just and reasonable adjustment and settlement of their rights against, and liabilities to, each other; that each of the parties has read the whole of this Agreement and understands it fully; and that there are no representations, warranties, promises or covenants other than those set forth herein,

IN WITNESS WHEREOF, the parties have hereunto affixed their hands and seals the day and year first hereinabove stated.

/s/ WESTLEY W. SILVIAN (SEAL)
Westley W. Silvian (Husband)

/s/ HANNAH S. SILVIAN (SEAL)
Hannah S. Silvian (Wife)

38 DISTRICT OF COLUMBIA, ss:

I hereby certify that on this 13th day of March, 1953, before me, the subscriber, a Notary Public, for the District of Columbia, personally appeared Westley W. Silvian and Hannah S. Silvian and each did acknowledge the foregoing Agreement to be their act and deed.

(SEAL) /s/ LILLIAN V. CRAWFORD
Notary Public, D. C.

My Commission Expires: Oct. 14, 1953.

39

Defendant's Exhibit No. 2

DEPARTMENT OF JUSTICE
OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON

Mr. Westley W. Silvian
Office of Alien Property
Department of Justice
Washington, D. C.

July 20, 1953

Dear Mr. Silvian:

Effective at the close of business August 21, 1953, your services as an Attorney in the Office of Alien Property will be terminated.

A lump sum payment of terminal leave standing to your credit at the close of business on the last day of active duty will be made shortly thereafter. All Government property and credentials loaned to you during your Government service should be turned in to the Administrative Branch, Office of Alien Property.

It is important that the Office of Alien Property have your current address for the purpose of forwarding your last salary and terminal leave checks as well as the W-2 Withholding Tax Information Form.

Very truly yours,

/s/ WILLIAM P. ROGERS
Deputy Attorney General

Filed October 7, 1953

**Opposition to Plaintiff's Motion to Adjudicate Defendant
in Contempt**

Comes now defendant, Westley W. Silvian, by his attorney, who, in opposition to plaintiff's motion to adjudicate defendant in contempt:

(1) Denies that defendant was or is guilty of contempt for failure to make payments provided for in the order of this Court dated March 12, 1953.

(2) States that plaintiff is not entitled to a money judgment for the amount of the arrears.

In support hereof defendant files his affidavit and exhibits attached hereto, and supporting points and authorities.

Respectfully submitted,

ROBERT E. SHER

Robert E. Sher

JAMES H. HELLER

James H. Heller

Attorneys for Defendant

1026 Woodward Building

Washington, D. C.

41 **Points and Authorities in Opposition to Motion to Adjudicate Defendant in Contempt**

1. Defendant's affidavit, attached to his Motion to Modify Order for Maintenance and Support submitted simultaneously herewith, and incorporated in the instant Opposition by reference, shows defendant's present inability to make the maintenance payments required by the Decree herein. "If an answer should show clearly the inability of a party to comply with the order (to show cause why he should not be adjudged in contempt) and there is nothing to the contrary, he ought to be discharged." *Tolman v. Leonard*, 6 App. D.R. 224, 235. See also *Caffrey v. Caffrey*, 55 App. D.C. 285, 4 F. 2d 952; *Kephart v. Kephart*, 89 App. D.C. 373, 193 F. 2d 677, cert. denied, 342 U.S. 944.

2. Moreover, his affidavit shows that defendant's deduction of One Hundred and Thirty-One Dollars and Nine cents (\$131.09) was in full accord with the provisions of the separation agreement executed by the parties hereto on March 13, 1952, and therefore does not constitute a willful refusal to comply with the terms of the decree of this Court. (A copy of this agreement is attached to defendant's Motion to Modify Order for Maintenance and Support, submitted simultaneously herewith, and said agreement is incorporated in the instant opposition by reference.) Plaintiff was informed of this deduction by a letter of May 1, 1953 from counsel for defendant, addressed to counsel for plaintiff. A copy of that letter is attached hereto. Where the parties affected by a court decree for maintenance subsequently agree to a modification of the terms of the decree, the court will honor the agreement and will not hold defendant in contempt where he has performed the agreement to the best of his ability. *Franklin v. Franklin*, 83 App. D.C. 334, 171 F. 2d 12.

3. Defendant has not been guilty of any laches or willful delay in bringing the facts shown in his attached affidavit to the attention of this Court. The affidavit shows that defendant's employment as attorney for the United

States Justice Department was terminated on August 21, 1953, and that since that date, defendant has earnestly sought reinstatement and has had reason to believe that reinstatement would be granted him. Moreover, defendant has filed simultaneously herewith his Motion to Modify the Order for Maintenance and Support entered by this Court on March 12, 1953. That motion, supported by affidavit of defendant, requests temporary relief from the duty of making maintenance payments until such time as defendant shall secure reinstatement or alternative employment.

4. In the light of *Kephart v. Kephart*, 89 App. D.C. 373, 193 F. 2d 677, cert. denied, 342 U.S. 944, entry of a judgment for the arrears is unnecessary.

Respectfully submitted,

ROBERT E. SHER
Robert E. Sher

JAMES H. HELLER
James H. Heller

Attorneys for Defendant
1026 Woodward Building
Washington 5, D. C.

44

SHER, OPPENHEIMER & HARRIS
ATTORNEYS AT LAW
1026 WOODWARD BUILDING
WASHINGTON 5, D. C.

COPY

May 1, 1953

Mrs. Hannah Silvian
3028 James Avenue, South
Minneapolis, Minnesota

Dear Mrs. Silvian:

Enclosed herewith is our check in the sum of \$68.91 to cover the first \$200 monthly payment due you under the

agreement of March 13, 1953 between yourself and your husband, less the following deductions:

Dr. Elmer Klein	\$75.00
Dr. David B. Veax	34.00
Dr. Naomi M. Kenoff	15.00
Frank R. Jelleff, Inc.—	
Shoes	7.09

Total	<u>\$131.09</u>
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Paragraph 8 of the agreement of March 13 provides in part:

The wife hereby warrants and represents to the husband that she will indemnify and save the husband harmless from any and all marital obligations and liabilities for necessities incurred prior to the date of this agreement.

The deductions listed above were taken pursuant to above provision.

Very truly yours,

ROBERT E. SHER

RES/mb

Enclosure

cc—Samuel B. Block, Esq.

* * * * *

45

Filed Oct. 28, 1953

Opposition to Motion to Modify Order for Maintenance and Support

Comes now the plaintiff and opposes the motion to modify the order for maintenance and support entered herein on March 12, and as grounds for said opposition, states as follows:

(1). That the Order was consented to by the defendant and the Agreement entered into voluntarily as a full and final settlement between the parties as to their property rights, custody of their minor child, maintenance and sup-

port for the wife and minor child and other matters referred to in the Agreement.

(2). That according to the affidavit of the plaintiff herein, the defendant on April 14, 1953 purchased substantial stock and made a cash payment towards the same of \$5,000.00 with his own check.

(3). That the plaintiff is employed full-time and earns less than Two Hundred Fifty Dollars (\$250.00) per month, according to her affidavit, which is insufficient to maintain herself and her child and is required to supplement her income by the use of her family inheritance.

(4). And for such other and further reasons as will be presented to the Court at the time of the argument of this motion.

46 WHEREFORE, the premises considered, it is respectfully requested that the Court deny the defendant's motion to modify order for maintenance and support.

SAMUEL B. BLOCK
Attorney for Plaintiff
 Samuel B. Block
 Investment Bldg.

* * * * *

47

Filed Oct. 28, 1953

Affidavit

County of Hennepin, }
 State of Minnesota } ss:

HANNA S. SILVIAN, being first duly sworn, upon oath, deposes and says that following the order of March 12, 1953 for maintenance for herself and infant daughter, her husband and she entered into the Separation Agreement dated March 13, 1953. In connection with the said Agreement and Order, the first payment was not due until May 1, 1953, in view of the fact that the defendant was apprised of the costs and obligations in the amount of One Hundred Thirty-One Dollars and Nine Cents (\$131.09) and had agreed to

pay them. She further states that she, nor her attorney, have ever waived, or intended to waive, the amount due under the May payment.

Your Affiant further states that by a reading of defendant's affidavit, by inference, it would indicate that the said Ten Thousand Dollars paid to your Affiant was defendant's money. The fact is, that this money was obtained from Affiant by the defendant after the marriage of the parties; that this money was the total inheritance from your Affiant's father; that the defendant persisted in nagging Affiant to allow him to use this inheritance for the purpose of investing in stocks, and in an endeavor to save the marriage, she turned this sum over to him.

48 Your Affiant further states that on April 14, 1953, a little over a month from the date of the order and agreement referred to, the defendant purchased, through W. B. Hibbs & Co. of 725 15th St., N.W., Washington, D. C., certain stocks in the sum of Ninety-Eight Hundred Eleven Dollars and Seventy-Six Cents (\$9811.76) and paid therefor \$5,000.00 by his own personal check.

Your Affiant further states that she is employed by the Synder Drug Company of Minneapolis, Minnesota and that her earnings do not net Two Hundred Fifty Dollars (\$250.00) per month and that out of said earnings, she must provide for herself and her minor daughter food, shelter, clothing, school expense, musical lessons and medical care; that her income at the present time is insufficient and inadequate and is being supplemented by Affiant's inheritance, which is rapidly being spent for the support of herself and minor child.

Your Affiant further states that the provisions of the Order and Agreement referred to were not premised on the defendant's continued tenure and employment at a substantially similar or greater income, but was a full, final and complete settlement between the parties as to property rights, custody, maintenance and other matters which can readily be gleaned by a perusal of the Agreement heretofore filed by the defendant in this cause.

Affiant further states that the defendant was gainfully employed in his usual capacity through the month of August, 1953 and either has coming to him or has obtained severance pay from the Government, in accordance with a letter dated July 22, 1953 from the Justice Department.

HANNAH S. SILVIAN
Hannah S. Silvian

Subscribed and sworn to before me this 24 day of October, 1953.

HENRY LEVINE
Notary Public
Henry Levine,
Notary Public, Hennepin County, Minn.
My Commission Expires Dec. 17, 1958

* * * * *

49

Filed Nov. 17, 1953

Affidavit

District of Columbia, ss:

Westley W. Silvian, being first duly sworn, on oath deposes and says:

This affidavit is filed in reply to the affidavit of the plaintiff herein dated October 24, 1953. It is a fact that pursuant to the provisions of the agreement of March 13, 1953, I paid to plaintiff the sum of \$10,000, which was \$2,000 more than I had. All of the facts concerning my assets and liabilities were known to plaintiff at the time of the execution of the agreement, and the agreement itself recites those facts.

Plaintiff also knew that my ability to make payments for maintenance and support was dependent on my being gainfully employed. It is a fact that I have not been employed since August 21, 1953. It is also a fact that I am unemployed at the present time and that I do not have or control, directly or indirectly, any property, aside from a sum of approximately \$90.00 in cash.

Plaintiff states in her affidavit that the \$10,000 which was paid to her pursuant to the provisions of the agreement of March 13, 1953, was merely a return of her property. This

is not the fact. In the year 1949 I had approximately
50 \$8,500 in cash. Later on in the same year plaintiff's

mother sent 100 shares of Purity Baking Company common stock registered in my name, 100 shares registered in plaintiff's name, and 50 shares registered jointly in both of our names. These shares were sold in either the latter part of 1949 or the early part of 1950 for approximately \$7,200. The proceeds of the sale of this stock, together with my \$8,500, were commingled and used to buy other stocks, approximately \$5,000 worth of household goods and family automobiles, of which three were bought over a period of time. The loss on the sale of two of the automobiles was approximately \$2,000. Plaintiff's affidavit ignores the fact that not only did she receive \$10,000 in cash but also all other property owned by either of us individually or by the two of us jointly, with the exception of an automobile worth at the time approximately \$1,200.

Plaintiff's affidavit suggests that I have other property because of a stock purchase made in my name on or about April 14, 1953, through the firm of W. B. Hibbs & Co. The total amount of stock purchased at that time was \$9,811.76, on which the sum of \$5,000 was paid. Although this stock was purchased in my name, the stock was not mine and I was a mere nominee for Miss Frances S. Arkin, who supplied the funds for this purpose. This stock was sold on June 16, 1953, for the sum of \$8,394.34, and the entire balance of \$3,651.73 (after adjusting for interest, dividends, and expenses) was transferred to Miss Arkin by W. B. Hibbs & Co. I had no interest in this transaction and the entire risk was assumed by Miss Arkin, who sustained the loss on the stock.

51 Miss Arkin withdrew the sum of \$9,000 from her account in the Liberty Building Association of Washington, D. C. on April 10, 1953, as is shown by the Liberty

Building Association Account Book No. S-6449. The Building Association's check No. S-18963, payable to Frances S. Arkin, in the sum of \$9,000, is dated April 10, 1953. This check was endorsed to me. I used \$5,000 of the \$9,000 in connection with the stock purchased aforementioned. \$2,700 was used by me to purchase for Miss Arkin \$2,700 worth of stock from Laidlaw & Co. on or about April 27, 1953. On May 11, 1953, I returned the balance of approximately \$1,300 to Miss Arkin. My bank statements bear out the fact that the money used in these transactions was not mine. On April 1, 1953, my bank balance (exclusive of outstanding checks) was \$750.47. At the end of May 1953, my balance (exclusive of outstanding checks) was \$594.72.

The statement in my previous affidavit as to my wife's present earnings were based upon statements made by her to my parents that her gross salary was in excess of \$500 per month. Since that time she appears to have changed her place of employment and employer and it is possible that she is working less hours or for lower wages.

WESTLEY W. SILVIAN

Subscribed and sworn to before me this 3rd day of November, 1953.

MILDRED M. BOYD

Notary Public, D. C.

My Commission expires June 30, 1956

* * * * *

53

Filed Nov. 23, 1953

Order

Upon consideration of the motions to adjudicate defendant in contempt, and to modify the order of maintenance filed herein; the exhibits and affidavits supplementing said motions; and argument of counsel for each of the parties hereto, it is by the Court this 23rd day of November, 1953.

ORDERED,

That at this time both of said motions be denied, "without prejudice".

By THE COURT:

DAVID A. PINE

SEEN:

SAMUEL B. BLOCK

Counsel for plaintiff

JAMES H. HELLER

Counsel for defendant

1

TRANSCRIPT OF PROCEEDINGS

Filed Mar. 9, 1954

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1075-53

HANNAH S. SILVIAN, *Plaintiff*,

v.

WESTLEY W. SILVIAN, *Defendant*.

Washington, D. C.,

Friday, November 20, 1953.

The above-entitled matter came on for hearing on motion at 2:00 o'clock p. m. on Friday, November 20, 1953, in the United States District Court for the District of Columbia, in the Court House, at Washington, D. C.

Before:

HONORABLE DAVID A. PINE, Judge of the United States District Court for the District of Columbia, and a jury.

Appearances:

SAMUEL B. BLOCK, ESQUIRE, on behalf of the plaintiff;
and

JAMES H. HELLER, ESQUIRE, on behalf of the defendant.

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PROCEEDINGS

The Deputy Clerk: Silvian v. Silvian; Mr. Block, Mr. Heller.

The Court: Who is your opponent, Mr. Block?

Mr. Block: Mr. Heller. He is here, Your Honor.

Mr. Block: May it please the Court, there are two motions here, one filed by me, a motion to adjudicate the defendant in contempt, and for money judgment. To that he has filed an opposition and an affidavit, and he also filed a motion to modify the decree itself.

The facts are these, briefly, Your Honor: On March 12th of this year, the plaintiff filed suit for maintenance for herself and minor child. An order was signed on March 12th, and according to the order, it was for \$200 a month, \$100 for each, the mother and the child, payments to commence May 1, 1953.

On March 13th, the day following, a full and complete property settlement was entered into between the parties, in which was embraced in fact the substance of this court order.

There was a time when the defendant became in arrears. As of September 1st, my client who is now living in St. Paul since the separation, she moved to St. Paul, and the defendant still resides in the District of Columbia, and she advised me that under the court order from
3 May 1st, until September, there should have been paid a thousand dollars, and she only received \$468.91, leaving a balance of \$531.09.

I then filed this motion, and the opposition was filed, and the motion to modify.

Now, there is a contention that \$131 should not—for the defendant to be given credit for \$131 because in the agreement proper it says, which is the usual agreement, that the wife agrees in effect that she has incurred no liabilities and no debts, and she will save him harmless and indemnify him. But he deducted from the May payment \$131, and she contends in her affidavit the reason the payment didn't begin until May 1st because he knew of the \$131 and had agreed to pay it.

There can be no question but what he is in arrears, even giving him credit for the \$131.

Now, he says the reason he has not paid, Your Honor, is that he was employed by the Department of Justice as an attorney at a salary of \$9,800 a year.

Then on July 21st he was notified that he would be discharged or separated from the service effective August

21st, and in fact on August 21st he was separated from the service.

He filed an appeal with the Civil Service Commission, and he says the Commission has ordered the Department of Justice to reinstate him.

Now, the Department of Justice has in turn appealed that decision to some other appeal body, ad infinitum, but in the meantime nothing has been paid.

That is our position, if the Court please, and I can discuss the motion to modify the decree, or would you like to hear from Mr. Heller first on that?

The Court: I will hear from him.

Mr. Heller: Your Honor, since I will go right on to the motion to reduce alimony, that is, properly to suspend it, or temporarily, I might say that these two motions are being heard together because they are two sides of the same coin.

The basic facts are these, and they are not denied or disputed, and they emerge from defendant's affidavit.

He has no property. By terms of the agreement, which occurred on March 13th, the day after the decree of this Court and which fully related to that, he was obligated to pay his wife, the plaintiff herein, \$10,000, and he had, as the agreement recites in Section 5, only \$8,000 worth of assets, cash at that time, plus an automobile.

Therefore he had to borrow. He has no property then, and no property now.

He lost his job on August 21st. He has no income now, and the agreement requires that he keep up payments on life insurance, a policy insuring his life, with the beneficiary his daughter.

He has kept up those payments on the basis of borrowed money, but he has no income now.

The Civil Service Commission has issued a decision which holds that he is entitled to his job, and the Government has appealed it.

The defendant expects that there will be a decision on that very shortly. Naturally he cannot predict what a semi- or quasi-judicial tribunal will do, what the course of this procedure is.

On the other hand, there was no obligation on the defendant to go out and look for another job, while there was such a completely reasonable, and there has been since September 1st when the Commission ruled, a reasonable hope he would be employed on the job for which he is best fitted and at which he can make the best income.

The defendant has diligently sought reinstatement. He has fought it all the way and he has this favorable decision.

Going on to the other side of the coin, and these same facts relate to that, other facts emerge from plaintiff's affidavit, namely, that she has an income of \$3,000 a year, which is \$3,000 a year at the moment more than he has.

6 Also that she has as a result of the agreement, signed the day after the decree of this Court, and referring to the Court decree, she has \$10,000, and that is a scant eight months ago.

Now, of course, one might say that in the best of all possible results, she should not have to eat into that lump sum for her support and her child, and I am not sure that she does with an income of \$3,000.

At any rate, the defendant has nothing at the moment, and this is not something that is his fault.

He was rified, as the phrase goes.

I don't believe there is much point in arguing the law. You are aware, Your Honor, that you have power to grant the defendant's motion for reduction of alimony.

The Court: When was it he received this termination of his employment?

Mr. Heller: He received notice he was terminated on August 21st. He received notice as required by law a month before. He sought and got less than 10 days

later from the Civil Service Commission a favorable ruling saying that he should be reinstated on September 1st.

The Court: Well, he is able-bodied. He has a profession. Why didn't he start practicing law?

Mr. Heller: Well, Your Honor, if he is to try to seek his job back—if I may speak from what I think is
7 common knowledge, it is that practice of the law in the District of Columbia right now is not an easy task.

The Court: Well, he could seek employment somewhere else.

Mr. Heller: Well, Your Honor, I don't believe that he is obligated to do that as long as he has such a reasonable hope that the Department of Justice will reinstate him, and the Civil Service Commission has clearly required that they should do this.

Now, Justice may appeal that, but nonetheless the Civil Service Commission—normally its decision should govern in the matter.

The Court: I should think the normal man would get a job in the District. If he cannot practice law, he would get a job while this is all going on, instead of sitting idly by and doing nothing.

Mr. Heller: Well, Your Honor, he has not been sitting idly by. A good deal of time has been consumed in prosecuting this appeal.

The Court: What time has been consumed in prosecuting the appeal? What are you talking about? You mean this motion?

Mr. Heller: No; the Civil Service Commission matter.

The Court: Oh, all right. Go ahead.

8 Mr. Heller: I think these are still basic facts. He is not sitting idly by.

The Court: But he is able-bodied.

Mr. Heller: He is trying to get his job back. He has very reasonable expectation that in the near future he will get his job back.

He asks only that this Court suspend the maintenance during the time he has not got that job. If it does not appear soon, he will have to go out and look for a job, for he cannot live on nothing himself.

In the meantime it might well prejudice his chances to get that job back if he did go to work somewhere else, Your Honor, and we are quite tied up with the favorable ruling that came down.

As to the fact that this Court has power, as I said, I think that there is no need to argue that. We ask then that there be a temporary suspension of this during the time when his wife has work, when he doesn't have work and when he is earnestly seeking his job back.

Mr. Block: May it please the Court, I am not in a position that I relish or enjoy in having to ask the Court to adjudge a member of the bar in contempt, any person, particularly a member of the bar. I am merely an advocate, if the Court please, of my client. Of course, in these domestic cases there is feeling between the parties.

9 As far as the \$10,000 received by the wife in the property settlement, she contends in her affidavit that it was money belonging to her, \$8,000 of that, if the Court please, coming from her father's estate, which he in turn received and in turn bought stocks with.

Now, she says also in her affidavit, if the Court please, a month later, after the separation, and after the agreement was signed, that he bought stock totaling about \$9,000, of which a \$5,000 check came from his account to buy that stock with.

Now, he in his counter affidavit said that stock was purchased in his name, but that the money was advanced by someone else. That he handled the stock for sometime thereafter, took a loss on the sale of it, and that the balance went to a Miss Frances Arkins.

Now, with regard to the question of modifying the decree, I think the Court in exercising its sound judicial discretion

should bear in mind the factors, all the factors in the case, and bear in mind the fact that on March 13th when the parties, after quite sometime, got together and made a full and final settlement.

For example, this is what they said: Whereas due to unfortunate and irreconcilable differences between them the parties have not lived together since June 6, 1952. The wife has charged the husband with misconduct.

10 This was filed by the defendant, not by me.

And with abandonment and desertion without cause, all of which charge the husband denies. The wife has filed suit in the District Court of the United States for the District of Columbia against the husband for separate maintenance, and also informed the husband that she intends to file suit against the alleged third party.

The parties desire by this agreement to fully and conclusively settle all matters of dower, courtesy, property rights, support, maintenance, and custody of the child, and all other rights or claims of any nature legal or equitable arising out of or connected with the marital relationship.

So in effect we are asked, as far as the agreement is concerned, Your Honor, to omit that which is detrimental to the defendant, but leave those in which are favorable to him.

If the Court should modify the decree, we would be placed in the inconsistent position of having the Court say, You shall pay so much a month, although your agreement says otherwise.

The Court: Well, you are attempting to enforce the agreement by an adjudication of contempt.

Mr. Block: No, Your Honor. What I am asking the Court to do in this motion is to adjudicate the defendant in contempt and for a money judgment for his non-
11 compliance with the order of court.

The Court: Yes. Well, I could do that or I could modify on a proper showing, but you could still bring suit for a money judgment under the agreement.

Mr. Block: That is correct, Your Honor.

I say: We have proceeded on the wife's instruction on the motion for the contempt. Now, I can say here, I don't like to prosecute this type of case against a man that has been with the Government for the last 10 or 12 years.

He feels he should not have been let out, and the Civil Service Commission felt the same way about it. Perhaps if I may be so presumptuous to suggest to the Court, perhaps the best procedure would be, I suggest it to the Court, would be not to modify the order of the Court, and perhaps to give him another 30 or 60 days in the hope something will develop and he may be reinstated.

I say this, but we know how these bureaus are. They may litigate this thing from now to the Supreme Court, which may be two or three years, Your Honor.

The Court: Well, I will—

Mr. Heller: Your Honor, may I be heard for a moment?

The Court: No, there is no opportunity for sur-rebuttal.

I will deny your motion to adjudicate, without
12 prejudice. I will deny the motion to modify, without prejudice. Both may renew their motions in due course.

But I suggest to defendant's counsel that he better look for a job and begin providing maintenance for this wife and not wait.

Mr. Block: I will prepare an order, if the Court please.

The Court: All right, because the next time I might not be so inclined.

(Thereupon the instant hearing was concluded.)

No. 12,144
BRIEF FOR APPELLEE

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WESTLEY W. SILVIAN, *Appellant*,

v.

HANNAH S. SILVIAN, *Appellee*.

Appeal from the United States District Court ^{United States Court of Appeals}
for the District of Columbia ^{the District of Columbia Circuit}

FILED

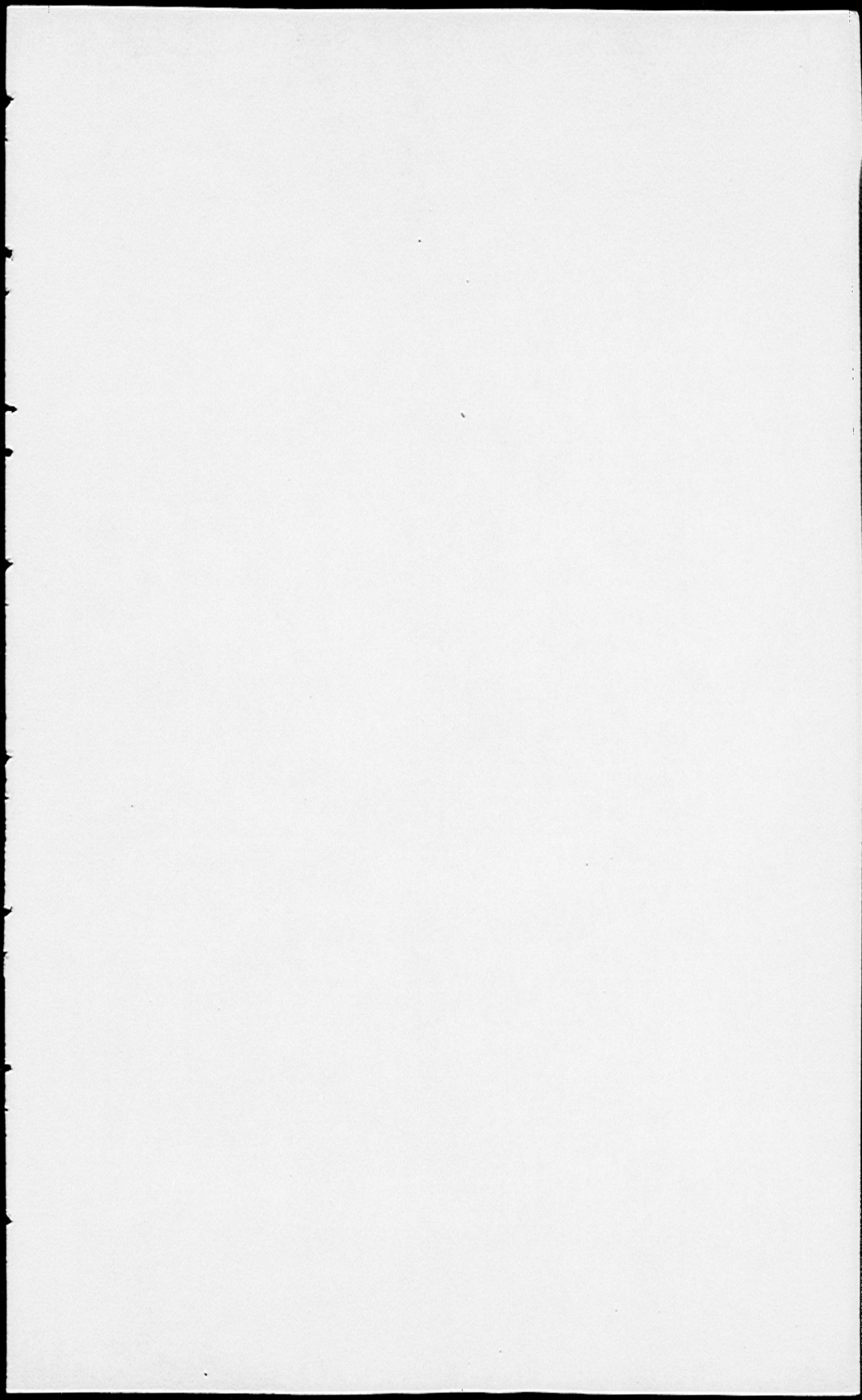
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Joseph W. Stewart
CLERK

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Of Counsel

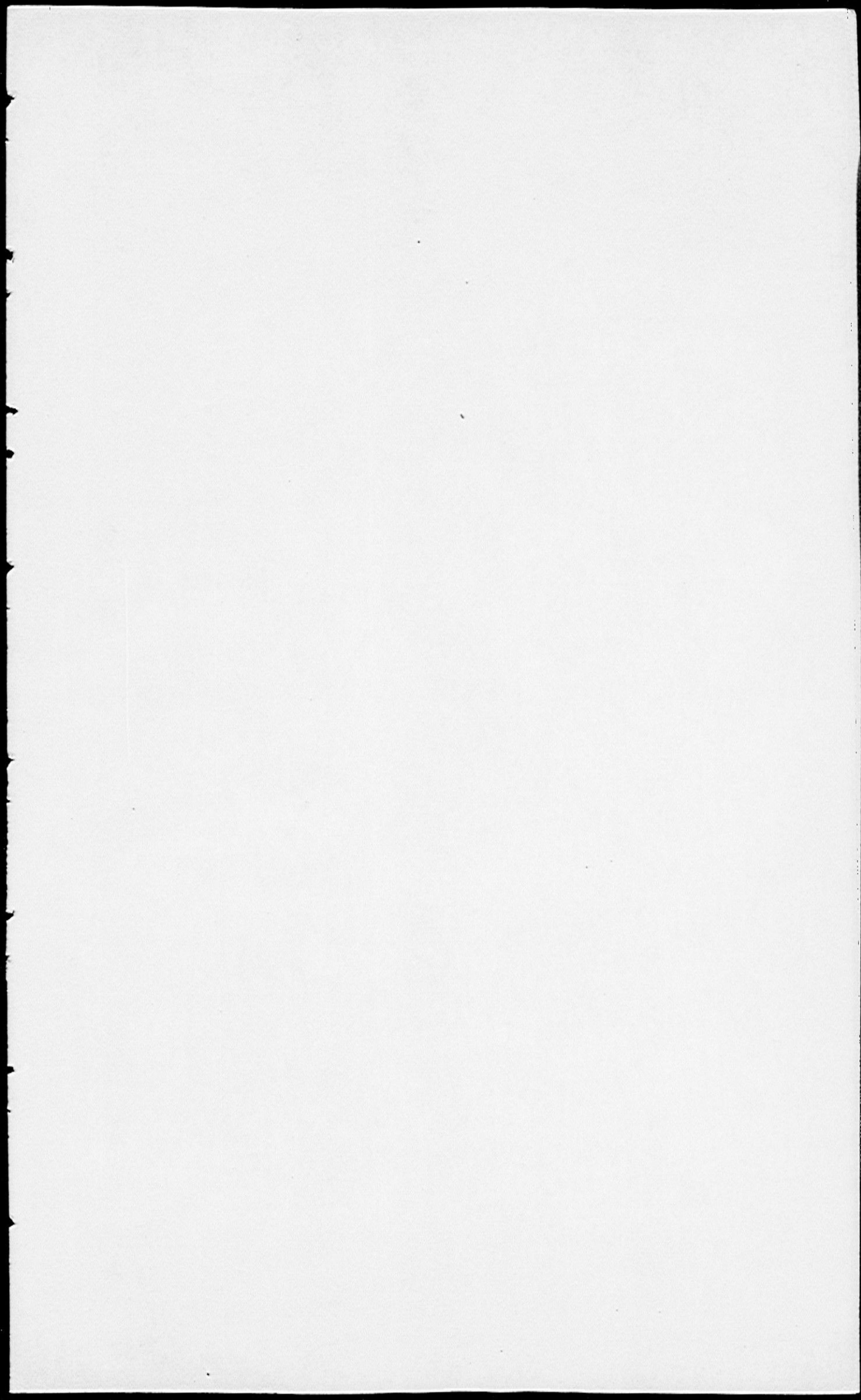
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No. 12,144

COUNTERSTATEMENT OF QUESTION PRESENTED

Does the record in the case at bar affirmatively show that the trial court abused its discretion in denying the motion of appellant to modify the order for maintenance and support theretofore entered.



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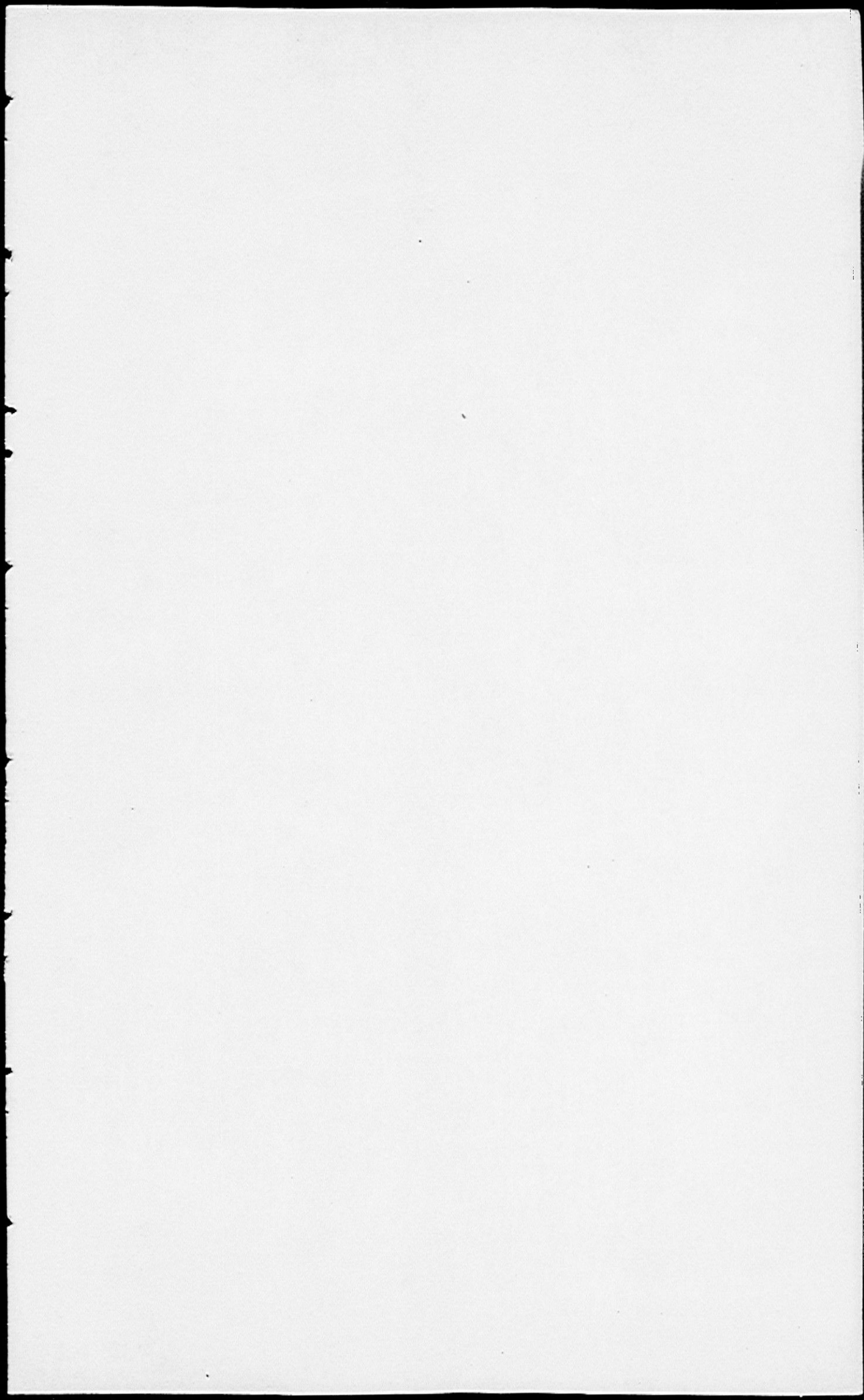
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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,144

WESTLEY W. SILVIAN, *Appellant*,

v.

HANNAH S. SILVIAN, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellee adopts, in general, the statement of the case as outlined by the appellant, but, wishes to invite the attention of this Court to the following matters not fully reflected in appellant's statement, as they appeared in the record before the trial court:

In her motion to adjudicate appellant in contempt (App. p. 6), appellee alleged an arrearage in the sum of \$531.09, and in her accompanying affidavit (App. p. 7) she averred that this arrearage accumulated from May 1 to September 1, 1953.

Appellant's Exhibit No. 2 (App. p. 19) shows that his employment was to terminate, effective, August 21, 1953, and that, as of that date he was to receive a lump sum payment of terminal leave, and a last salary check. While the record contains no information concerning the amount represented by these items, it must have been substantial in view of the fact that appellant had been employed "for many years," as an attorney with the Department of Justice, at a salary of \$9,800.00 per annum.

The money given to appellee pursuant to the separation agreement represented a return by appellant to his estranged wife of her separate funds theretofore made available to him for investment merely. (App. p. 25).

The record discloses a direct conflict as to property ownership by appellant at the time pertinent to these proceedings below. Appellee alleged that the sum of \$5,000.00 was invested by appellant in the purchase of stock on April 14, 1953 (App. p. 24).

SUMMARY OF ARGUMENT

1. This Court is without jurisdiction in the premises.
2. The Court below was without legal authority to grant appellant's motion.
3. The action of the trial court is proper as a sound exercise of judicial discretion.

ARGUMENT

I

Title 28-1291 U.S.C. vests in this Court jurisdiction of appeals from all "final decisions . . .". In *Lesh v. Lesh*, 21 U.S. App. D.C. 475, it has been decided that an Order for payment of alimony pendente lite in a suit for separate maintenance is, in effect, a final order and appealable. The present appeal, however, is not from the original order for maintenance (App. p. 5) but from an order denying appellant's motion for a modification of the original order (App. p. 8). Such an order, it is submitted, is interlocutory in character and, since not comprised within the exceptions enumerated in Title 28-1292 U.S.C. is not appealable to this Court. Appeals from decisions on motions depending on exercise of discretion have not been traditionally favored. *McCargo v. Chapman*, 61 U.S. 555, 15 L. ed. 1021; *Dean v. Mason*, 61 U.S. 198, 15 L. ed. 876. The fact that appellant's motion was denied without prejudice (App. p. 28) especially militates against the entertaining of the instant appeal by this Court.

II

In his motion, appellant sought relief from the duty of paying maintenance and support alleging his inability to pay any part thereof. To the extent to which appellant was endeavoring to be rid of the duty to pay past-due monthly installments, the trial court was without any legal authority in the premises. In *Lockwood v. Lockwood*, 82 U.S. App. D.C. 105, 160 F. 2d 923, this court stated:

"It is well settled in this jurisdiction that the trial Court is without power to effect a revision or remittance of past due alimony."

This principle was reiterated in *Brown v. Brown*, 92 U.S. App. D.C. 319, 205 F. 2d 720.

As far as amounts to accrue prospectively are concerned, it is submitted that the trial court was without authority to relieve appellant from the provisions of the order of March 12, 1953, for the reason that it was a Consent Order based upon a formal agreement between the parties concerned.

"It is very widely and generally held that divorce decree provisions which actually rest upon consent and agreement of the parties, or which merely refer to an agreement between them and recognize its existence . . . are not subject to modification by the Court even though the circumstances of the parties change. The arrangement being contractual instead of a judicial determination, it is no more subject to change by the Court than the terms of any other contract." 2 *Nelson, Divorce and Annulment*, (2nd ed.) Sec. 17.03, and authorities there cited.

III

Aside from any question of jurisdiction or legal authority, it is clear that allowances of separate maintenance are discretionary in the exercise of the equitable powers of the trial court. *Lesh v. Lesh, supra*; *Bernsdorff v. Bernsdorff*, 26 U.S. App. D.C. 520. An exercise of discretion in matters of this nature will not be overthrown on appeal "without good cause," *Lesh v. Lesh, supra*, or unless such discretion was "manifestly abused." *Seeley v. Seeley*, 30 U.S. App. D.C. 191, cert. den. 209 U.S. 544. An abuse of discretion is said to occur when the judicial action taken is "arbitrary (considered such if exercised for an erroneous reason, in *Na'l Ben. Life Ins. Co. v. Shaw-Walker Co.*, 71 U.S. App. D.C. 276, 111 F. 2d 497, cert. den. 311 U.S. 673), fanciful, or unreasonable." *Delno v. Market St. Ry. Co.*, 124 F. 2d 965. "Unreasonable" is defined in the case last cited as meaning that if reasonable men would differ as to the propriety of the judicial action taken, same would not be disturbed. Reviewing courts

are reluctant to interfere with rulings of trial judges on questions of modification of Orders for separate maintenance. Abuse of discretion to warrant such action must be affirmatively shown. *Whitehead v. Whitehead*, 45 Cal. App. 2d 447, 114 P. 2d 403; *Burr v. Burr*, 313 Mich. 330, 21 N.W. 2d 150; *Brin v. Brin*, 240 Iowa 659, 37 N.W. 2d 261.

It is respectfully submitted that in the case at bar, appellant has failed to discharge the serious burden of demonstrating, affirmatively, an abuse of discretion on the part of the Court below. It is well settled that in order to obtain a modification of an Order for separate maintenance it is not sufficient to point to changed circumstances, objectively; the movant has to go further and make a showing that such change is not due to his voluntary act or neglect. *Crosby v. Crosby*, 182 Va. 461, 29 S.E. 2d 241; *Mahan v. Mahan*, 239 Mo. App. 317, 192 S.W. 2d 626; *Ralphs v. Ralphs*, 86 Cal. App. 2d 324, 194 P. 2d 592. While appellant herein has fully set forth the fact that he has lost his position, he has not made any showing whatsoever that he has made any effort to secure other employment, or that he is physically handicapped. The trial judge was of the opinion that as an able-bodied man, it was incumbent upon appellant to seek a job while waiting for official action in connection with his efforts to seek restoration to his former position. (App. pp. 34-37). Bearing in mind that appellant has prayed to be relieved from the duty to pay "until such time as he shall secure new employment or reinstatement to his former position," without any further qualification or limitation, there was no other course for the trial judge to follow but to exercise his discretion adversely to appellant.

The record in this case discloses a conflict as to appellant's pecuniary position in the spring and summer of 1953; concerning the source of the money which appellant

paid to appellee pursuant to their separation agreement, and with reference to appellant's claim of a credit of \$131.09, against the arrearage of \$531.09. Involving the test of credibility, the exercise of the discretion of the trial judge might well have been guided, to some extent, by his being more impressed with the veracity of appellee on these particulars. But, as to the fact that appellant was in arrears and, technically, in contempt of the Court's Order, there was no doubt. Abundant authority is to be found for the proposition that non-compliance with an existing Order for maintenance as to accrued installments is a legitimate factor in guiding a Court's exercise of discretion upon an application for the modification of such an order, prospectively. *Heard v. Heard*, 116 Conn. 632, 166 A. 67; *Cooper v. Cooper*, 103 N.J. A. 416, 143 A. 559; *Hulcher v. Hulcher*, 177 Va. 12, 12 S.E. 2d 767. Furthermore, appellant's own repeated statements (App. pp. 22, 34) of his expectation of reinstatement might reasonably have led the Court to conclude that, in view of such possibility, the Order not be modified and the appellant not adjudged in contempt.

The Agreement of Separation voluntarily entered into by the parties herein furnishes additional, urgent reasons pointing to the judicious exercise of discretion by the Court below. That instrument purported to be a comprehensive and final settlement of all issues, e.g., custody, dower, maintenance, courtesy, etc., then outstanding, or likely to arise in the future, between them. It would have been doing less than equity, if, in this posture of the case, the Court would have acceded to appellant's request to free him indefinitely of his obligation to furnish support and maintenance to his wife and minor child and, at the same time, leave the appellee's obligation unimpaired. Even had the Court granted appellant's motion, it would have accomplished nothing thereby, for appellee could still

proceed to obtain a money judgment under the terms of the separation agreement. Under these circumstances, the Court properly exercised its discretion by refusing to modify the Order. The words spoken by Chief Justice Stone in *Di Giovanni v. Camden Ins. Assn.*, 296 U.S. 64, 71, 80 L.ed. 47, are quite applicable on this aspect of the argument:

"Equity not infrequently withholds relief which it is accustomed to give where it would be burdensome to the defendant [appellee] and of little advantage to the plaintiff [appellant]."

CONCLUSION

On the basis of the argument herein, it appears that there is no showing of any abuse of discretion by the Court below, and it is respectfully prayed that the Order denying appellant's motion without prejudice be affirmed.

Respectfully submitted,

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